And it is no answer to say, that although the appellants' bonds may still be good in England, yet the judges in Scotland ought not to sustain action upon them in opposition to their own law, which holds the debt extinguished in forty years, because it would be wrong to apply the statutes relative to the negative prescription in Scotland to foreign transactions or contracts, executed in a foreign country, and where both debtor and creditor have their domicile. These statutes can have no authority *extra territorium.*

Counsel having been called to be heard in this cause; and no counsel appearing for the respondents, the appellants' counsel were heard to state and argue the case (as above), and being withdrawn, it was

Ordered that the interlocutors complained of be reversed, in so far as they sustain the objections to the bonds claimed by the appellants, that the same are not entitled to a place in the ranking, in respect they are cut off by the negative prescription of the law of Scotland.

N. B.—*No Respondents' case delivered.*

For Appellants, *Ilay Campbell, John Scott, Alex. Wight.*

MISS JANE WHITEFOORD, only surviving Child of the deceased Bryce Whitefoord, } *Appellant;*

JAMES WHITEFOORD, Esq. - - *Respondent.*

House of Lords, 15th March 1788.

SUCCESSION—FIAR—INFEFTMENT—DISPENSATION CLAUSE—PRESCRIPTION.—A father conveyed his estates to his heir male, whom failing to his eldest daughter. The heir male, after the death of the father, succeeded, but died without issue; having, previous to his death, conveyed the estates to a remote relation of the same name: Held, that as fiar, he was entitled so to convey the estates, notwithstanding the destination over in favour of the daughter. Objection to sasine, that the dispensation clause, granted by the Crown, making infeftment on one part of the lands good for the whole was inept, these lands being held of different superiors. Objection repelled, prescription having run upon the title. Affirmed in the House of Lords, without prejudice to any challenge appearing on the face of the sasine of the lands of Kirkbryde; said reservation being of consent of parties.

Bryce Whitefoord, then in possession of the lands of Dunduff, Cloncaird, and others holding of the prince; and the lands of Kirkland of Maybole, called Kirkbryde, holden of the crown, obtained a charter erecting the whole into a ba-

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rony, to be called the barony of Whitefoord, whereof the manor place of *Cloncaird*, thereafter called the mansion house of Whitefoord, was declared to be the principal messuage; and the charter contained a clause declaring that one sasine to be taken on any part of the said lands was to be sufficient for all the lands contained in the charter, whether holding of the crown or prince, and infeftment followed on this charter in that form.

Bryce Whitefoord thereafter married, and entered into a postnuptial contract of marriage with his wife, by which he disponed the whole lands then belonging to him, or that might afterwards accrue, to the heirs male of the marriage; whom failing, to the heirs male of any other marriage; whom failing, to such other person as he might afterwards name in a writing: which writing he executed two days afterwards by a deed of nomination bearing reference to that deed, and disponing these estates, failing *heirs male*, to his eldest daughter, the appellant.

On the death of her father, the appellant's brother, James Whitefoord succeeded, but died some years after succeeding, without issue. Before his death, he conveyed the whole lands and estate to the respondent, who was distantly related, and totally disinherited the appellant, without any apparent cause.

Conceiving that she had a right to succeed to her father's estates, in virtue of the postnuptial contract and deed of nomination on failure of heirs male, she brought a reduction, in which two points were made:—1. That he had no power gratuitously to alter the order of succession so settled by her father's deeds; and, 2. That his sasine in the lands of Kirkland of Maybole or Kirkbryde, holden of the king, with infeftments taken at the manor place of Whitefoord, formerly called Cloncaird, which latter lands were held of a different superior (the prince) was null, because the crown could not give a dispensation for taking an infeftment upon lands belonging to a different superior, but only as to lands held under the crown. In defence, it was stated that the appellant was only to succeed "in case I should have no heirs "male procreated of my body of this present marriage;" but as that event never happened, and as there were heirs male of the marriage who *succeeded*, the appellant's claim was untenable. Besides, having made up titles, not on the contract, but otherwise, as nearest and lawful heir to his father, and possessed for 40 years, she is barred by prescription.

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The Lord Ordinary sustained the defences, "repels the "reasons of reduction, assoilzies and decerns." And, on reclaiming petition, the Court adhered.

Against these interlocutors the present appeal was brought to the House of Lords.

Pleaded for the Appellant.—1. The plea of prescription does not apply, because the deeds under which the appellant rests her claim were never registered, but kept concealed in the private repositories of the brother, so that the act 1617 does not apply, because neither acquiescence nor negligence, which is the principle of that act, could be presumed against her. At all events, it can only apply to the barony of Dunduff. 2. The contract of marriage and deed of nomination, which followed two days thereafter, must be read as *partes ejusdem negotii*, executed by the same parties, and constituting one settlement, by which it was manifest that after the existence and subsequent failure of heirs male of the marriage of her father's body, the appellant, his eldest daughter, was to succeed. This his intention was evidenced by reserving a faculty in the postnuptial contract to name other heirs, failing the heirs male of his body, and by his exercising this reserved faculty in the execution of the deed of nomination, disponing his estate to the appellant. This intention being thus apparent, the deed ought to receive a construction favourable to the appellant from parental affection, and especially in doubtful words, the rule "semper in dubiis benigniorâ præferenda sunt," ought to hold. And no prescription applies to bar the present challenge, especially in reference to the lands of Kirkbryde. At all events, it is clear that her brother's deed, disinheriting her, could not make an effectual conveyance unless he had first vested in him a feudal right to these lands. He had not such complete feudal right as to the lands of Kirkbryde holden of the crown, no sasine having been taken on these lands, but only at the manor place of Cloncaird, which are lands held of a different superior, and therefore she had a right to succeed to these. Nor is it an answer to this to say, that the dispensation in the crown charter 1702, whereby it is declared that the infeftment taken upon any part of the lands should be sufficient for the whole, because the crown, although entitled to make such a dispensing power as to lands held of the king as superior, yet was not entitled to do so as to lands held *not of him* but of another.

Pleaded for the Respondent.—1. In the deeds on which the appellant founds, there is nothing but a simple destina-

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tion over failing heirs male, without any prohibition against alienation or altering the order of succession. And even if the appellant's construction of that destination were perfectly undoubted, still it would stand equally clear in law, that a contract disponing to the heirs male of the marriage, with substitutions over calling the heirs female, on failure of the heirs male, the heir who first takes is *unlimited fiar*; and the substitutes have merely a hope of succession. Under such a destination, the restraint only lies on the father. If it is wished to be carried further, it must contain express prohibitions against alienation and altering. Besides, the destination to her was only conditional, "in case of failing "of heirs male procreate of my body of the present mar-"riage." But as there was an heir male who succeeded and possessed for 60 years, the right was in him as an absolute fee, with no obligation to prevent him executing a deed such as would effectually disappoint the substitutes so named by his father, which right has been fortified therefore by prescription. 2. In regard to the lands of Kirkbryde, the objection is extremely frivolous. No doubt seisin, according to feudal principles, must be taken by symbolical delivery upon every discontiguous tenement. But here the lands were united into a barony, with a dispensing clause declaring that sasine taken on any part would be sufficient for the whole; and it is no answer to this to say, that the crown had no right to confer a dispensing power as to lands over which it held no right of superiority, as for example, as to lands held of a subject superior, or of the prince, because the king is head superior of all lands in Scotland, and to grant such rights of dispensation is a part of the prerogative of the crown which he does as to bishops lands, and is equally competent to do as to principality lands. The infeftment as taken, therefore, was perfectly regular, and in conformity with the charter.

After hearing counsel, it was

Ordered and adjudged that the interlocutor be affirmed, without prejudice to any challenge arising on the face of the instrument of sasine of the lands of Kirkbryde of the 13th May 1726, the said reservation being made with consent of the respondent.

For the Appellant, *John Scott, Jas. Boswell.*
For the Respondent, *Ilay Campbell, Geo. Ferguson.*

NOTE.—Unreported in Court of Session.